

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER, LLP

A NEW YORK LIMITED LIABILITY PARTNERSHIP

901 FIFTEENTH STREET, N.W.
WASHINGTON, D.C. 20005-2327

425 PARK AVENUE
NEW YORK, NY 10022-3598
(212) 836-8000
FAX (212) 836-8689

1999 AVENUE OF THE STARS
LOS ANGELES, CA 90067-6048
(310) 788-1000
FAX (310) 788-1200

(202) 682-3500
FAX (202) 682-3580

DOCKET FILE COPY ORIGINAL

NINE QUEEN'S ROAD CENTRAL
HONG KONG
852-2845-8989
FAX 852-2845-3682

WRITER'S DIRECT DIAL NUMBER

December 10, 1997

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: GC Docket No. 95-172

Dear Ms. Salas:

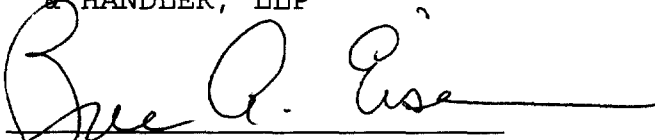
On behalf of Rainbow Broadcasting Company and Rainbow Broadcasting Limited, there is transmitted herewith and filed an original and four (4) copies of a "Motion for Consolidation of Proceedings".

Should any questions arise with respect to this matter, please contact the undersigned counsel.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS
& HANDLER, LLP

By:


Bruce A. Eisen

Enclosure

No. of Copies rec'd
List ABCDE

024

RECEIVED
DEC 10 1997
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

DOCKET FILE COPY ORIGINAL

In re Applications of)	
)	
RAINBOW BROADCASTING COMPANY)	GC Docket No. 95-172
)	File No. BMPCT-910625KP
For an Extension of Time)	File No. BMPCT-910125KE
to Construct)	File No. BTCCT-911129KT
)	
and)	
)	
For an Assignment of its)	
Construction Permit for)	
Station WRBW(TV), Orlando, Florida)	
)	
In re Application of)	
)	
RAINBOW BROADCASTING LIMITED,)	File No. BAPCT-9710232IA
Assignor)	
)	
and)	
)	
UNITED TELEVISION, INC.,)	
Assignee)	
)	
For an Assignment of)	
Permit/License of WRBW(TV),)	
Orlando, Florida)	

TO: The Commission

MOTION FOR CONSOLIDATION OF PROCEEDINGS

Rainbow Broadcasting Company ("RBC") and Rainbow Broadcasting Limited ("RBL") (sometimes collectively referred to as "Rainbow"), hereby request the Commission to consolidate and

process the above-captioned applications which include the assignment of license of Television Station WRBW(TV) at Orlando, Florida, from RBL to United Television, Inc. ("United"). In support thereof, the following is shown:

Background

1. Rainbow is the permittee of Station WRBW(TV) which operates on UHF Channel 65 at Orlando. The captioned proceedings, which encompass applications for extension of time in which to construct, as well as the 1991 application for assignment of the WRBW(TV) construction permit from RBC to RBL, have had a lengthy and convoluted history.

2. RBC first filed its application for a construction permit in 1982, and a comparative hearing with a full panoply of appeals followed. The grant of its construction permit did not become a final order until August 30, 1990, when the United States Supreme Court denied rehearing, thereby upholding the Commission's minority preference policy by which RBC had been awarded the construction permit. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), petition for rehearing denied, 497 U.S. 1050 (1990).

3. Through a series of informal objections, Press Broadcasting Company ("Press"), a competing licensee,¹ successfully challenged RBC's extension of construction permit and pro forma assignment applications, each of which had previously been granted by the Commission. Rainbow Broadcasting Company, 9 FCC Rcd 2839 (1994). Ultimately, the D.C. Circuit remanded the proceeding and required the Commission to designate the applications on several basic, qualifying issues. See, Press Broadcasting Company, Inc. v. FCC, 59 F.3d 1365 (D.C. Cir. 1995). The issues included inquiry into whether or not RBC had violated the Commission's ex parte rules; whether or not it had misrepresented or lacked candor with regard to its financial qualifications; whether or not it had misrepresented the nature of certain tower litigation in terms of its failure to construct its facility; and whether or not it was entitled to a waiver of the Commission's rules, or to an extension of its construction

¹ Press was not a party to the Channel 65 comparative hearing. Through a channel swap approved in 1991, it became the licensee of Channel 18 at Clermont, Florida. Press, pursuant to a pro forma assignment of license, is now P&LFT, LLC. Its license renewal for WKCF(TV) at Clermont is pending while the Commission reviews serious qualifications questions raised by Rainbow against Press.

permit. See, Memorandum Opinion and Hearing Designation Order,
11 FCC Rcd 1167 (1995).²

4. A full hearing on the issues was subsequently held, and Administrative Law Judge Joseph Chachkin released his decision in Rainbow Broadcasting Company, 12 FCC Rcd 4028 (released April 2, 1997) ("Initial Decision"). The ALJ determined that, based on the evidence adduced under the issues specified, RBC was fully qualified to be a Commission licensee, and that grant of the pending applications would serve the public interest, convenience and necessity. Hence, each of the basic qualifying issues was resolved in the permittee's favor. Exceptions and replies to exceptions to the Initial Decision were filed on May 16, 1997 and May 29, 1997, respectively, and the case is now pending before the Commission on appeal.³

² RBL was the permittee that had constructed Station WRBW(TV), having succeeded to the construction permit of RBC, a general partnership comprised of the same individuals who are now RBL's general partners. RBC no longer exists. Its presence in the captioned proceeding resulted from the ALJ's Order that RBC enter an appearance since, arguably, some of the matters underlying the issues had their genesis at a time when RBC was the applicant or permittee.

³ Exceptions have been filed by Press and a Separate Trial Staff designated by the Office of the General Counsel in light of the Mass Media Bureau's recusal after the specification of an ex parte issue that implicated conduct
(continued...)

CONSOLIDATION

5. Also pending before the Commission is an application for the assignment of license of Station WRBW(TV) from Rainbow to United filed on October 23, 1997. The assignment application was accepted for filing pursuant to the Commission's public notice (Report No. 24113) released November 6, 1997. The Commission is now requested to consolidate its processing of the assignment application together with its consideration of the exceptions to the ALJ's Initial Decision. It is anticipated that the Commission can thereby affirm the Initial Decision and simultaneously grant the application for assignment of license.

6. The Rainbow/United assignment application was placed on Public Notice on November 6, 1997. Only P&LFT, the successor to Press, filed in response. By Petition to Dismiss or Deny, filed December 5, 1997, P&LFT sought dismissal or denial of the assignment application arguing that Rainbow's basic qualifications must be affirmed by the Commission before the operating authority for Channel 65 can pass to United and that in

³ (...continued)
of both Rainbow and certain Bureau staff persons.

view of the history of the proceeding, the Commission rather than the Mass Media Bureau, should act on the assignment application.

7. While Rainbow rejects P&LFT's belief that the Bureau's recusal from the licensing proceeding extends to the assignment, it is in agreement with P&LFT to the extent that the ends of justice and administrative efficiency suggest that the assignment application should be acted upon by the Commission in the first instance. Rainbow also recognizes, as P&LFT notes, that consideration of the assignment application is necessarily conditioned upon a favorable review of the Initial Decision currently pending before the Commission on appeal. Thus, for the reasons urged by P&FLT, it is clear that the appeal and assignment should be consolidated for the Commission's consideration. Such an action would be consistent with precedent and the Commission's rules, as discussed below.

8. Section 1.227 of the Commission's rules contemplates consolidation of proceedings when to do so would "best conduce to the proper dispatch of business and to the ends of justice...". This is such a case. The applicant in both the licensing and the assignment proceedings is Rainbow Broadcasting Limited. The assignment contract is wholly dependent upon the outcome of the

licensing proceeding and Channel 65 is the object of both the licensing and the assignment proceeding.

9. It is important to note that the objector to the captioned assignment application is largely the same adverse party which has participated in the licensing hearing. Its past history has been to prolong and to try to block Rainbow's ability to operate Channel 65 at Orlando. One need only refer to the Initial Decision to see that the ALJ perceived Press as a party intent on keeping Rainbow off-the-air. See, Initial Decision, 12 FCC Rcd at 4048 and 4059, where the ALJ concluded that further Commission inquiry might be warranted and might show that Press had conspired to keep Rainbow from commencing operations. Press' inclination to delay a resolution of this matter is manifest through its present filing and its previous actions.

10. Consolidation of the assignment and licensing proceedings would speed, not delay, final resolution of all matters relating to Channel 65. The United/Rainbow assignment agreement is specifically predicated upon Rainbow's ability to assign the authorization to operate Channel 65 and Rainbow's ability to assign is, of course, dependent upon favorable Commission review of the Initial Decision. Thus, no final action

can be taken on the assignment application until Commission action on the pending appeal.⁴ In view of the direct relationship of the two proceedings, both the private and public interest in efficient utilization of resources and in the expeditious resolution of the proceedings support the consolidated consideration of GC Docket No. 95-172 and the assignment application.

11. Here, as opposed to cases where the Commission has declined consolidation, e.g., TV Channel Assignments, 51 RR2d 57, 61 (1982); In re Comsat/Contel, 2 FCC Rcd 7202, 7205 (Chief, Common Carrier Bureau, 1987); Nextel Communications, Inc., 10 FCC Rcd 3361, 3363 (1995), consolidation would expedite rather than delay consideration of the pending applications and the outcome of the assignment proceeding is conditioned on the outcome of the licensing proceeding. Given the overlap of parties and issues,

⁴ It has long been Commission policy (affirmed by the Court in Jefferson Radio Co. v. FCC, 340 F.2d 781 (D.C. Cir. 1964)), that an assignment application cannot be granted while the assignor's qualifications to be a licensee are in issue. Notwithstanding the favorable resolution of Rainbow's qualifications in the Initial Decision, *supra*, that determination is not final until Commission action on the appeal.

it is clearly in the interest of administrative efficiency to have the licensing and assignment applications considered simultaneously by the Commission.

12. In addition to expedition and efficiency, consolidation would also serve the interests of justice by permitting the Channel 65 proceeding, which has been ongoing since 1982, to come to a conclusion. Rainbow has operated Station WRBW(TV) effectively and in compliance with Commission rules for four years pursuant to Program Test Authority. Expeditiously and favorably resolving the proceeding through consolidation would allow a fully qualified licensee to operate Channel 65 for the benefit of the Orlando, Florida public. United would be such a licensee. The petition to dismiss does not in any way seek to undermine United's qualifications.

13. Failure to consolidate would unnecessarily delay consideration of the assignment application and would surely prejudice United as well as the viewers in the Channel 65 service area. Consolidation would comport with effective Commission processing and likely conserve Commission resources. Importantly, no party would be prejudiced by such Commission action. Only the obstructive motives of the petitioner would be impeded.

In light of the foregoing, the Commission should consolidate (i) the exceptions filed in GC Docket No. 95-172, and (ii) the application for assignment of permit from RBL to United Television, Inc. and expeditiously resolve both proceedings.

Respectfully submitted,

RAINBOW BROADCASTING COMPANY

By: Bruce A. Eisen
Bruce A. Eisen

KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER, LLP
901 15th Street, N.W.
Washington, D.C. 20005
(202) 682-3500

RAINBOW BROADCASTING LIMITED

By: Margot Polivy (BAE)
Margot Polivy

By: Katrina Renouf (BAE)
Katrina Renouf

RENOUF & POLIVY
1532 16th Street, N.W.
Washington, D.C. 20036
(202) 265-1807

December 10, 1997

CERTIFICATE OF SERVICE

I, Toni R. Daluge, a secretary in the law firm of Kaye, Scholer, Fierman, Hays & Handler, LLP, do hereby certify that on this 10th day of December, 1997, a copy of the foregoing "Motion for Consolidation of Proceedings" was sent via United States mail, postage prepaid, to the following:

David Silberman, Esq. *
Chief, Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 602
Washington, D.C. 20554

John I. Riffer, Esq. *
Asst General Counsel - Administrative Law
Office of the General Counsel
Federal Communications Commission
1919 M Street, N.W.
Room 610
Washington, D.C. 20554

Margot Polivy, Esq.
Katrina Renouf, Esq.
Renouf & Polivy
1532 16th Street, N.W.
Washington, D.C. 20036

Harry F. Cole, Esq.
Bechtel & Cole, Chartered
1901 L Street, N.W.
Suite 250
Washington, D.C. 20036

Marvin Diamond, Esq.
Hogan & Hartson
555 13th Street, N.W.
Washington, D.C. 20004


Toni R. Daluge

* Hand Delivered